



MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006

BONNIE J. K. RICHARDSON
VICE PRESIDENT
TRADE AND FEDERAL AFFAIRS

(202) 293-1966, Ext. 129
FAX: (202) 293-7674
INTERNET: mpaadc@ix.netcom.com

August 16, 1996

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BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary

Federal Communications Commission
1919 M. Street, NW
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re:

IB Docket No. 96-111

CC Docket NO. 93-23

RM-7931

File No. ISP-92-007

Amendment of the Commission's Regulatory
Policies to allow Non-U.S.-Licensed Space
Stations to Provide Domestic and International
Satellite Service in the United States

Dear Mr. Caton:

Transmitted herewith on behalf of the Motion Picture
Association of America, Inc. are an original plus nine copies of its Reply
Comments in the above referenced proceeding.

Respectfully submitted,

Bonnie J. K. Richardson

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
Amendment of the Commission's Regulatory)	IB Docket No. 96-111
Policies to allow Non-U.S.-Licensed Space)	
Stations to Provide Domestic and International)	
Satellite Service in the United States)	
)	
and)	
)	
Amendment of Section 24.131 of the)	CC Docket NO. 93-23
Commission's Rules and Regulations to)	RM-7931
Eliminate the Licensing Requirement for)	
Certain International Receive-Only)	
Earth Stations)	
)	
and)	
)	
COMMUNICATIONS SATELLITE CORPORATION)	File No. ISP-92-007
Request for Waiver of Section 25.131(j)(1))	
of the Commission's Rules As It Applies to)	
Services Provided via the Intelsat K Satellite)	

**REPLY COMMENTS OF
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

August 16, 1996

SUMMARY

The Motion Picture Association of America (MPAA) supports allowing non-U.S. satellite systems to serve the U.S. market. But, MPAA is unalterably opposed to granting entry to satellites licensed outside the United States if that country's marketplace is closed to, or severely restricts U.S. satellite systems that distribute video programming. In determining whether markets are closed or restricted, the FCC should consider foreign restrictions on U.S. content, such as content quotas or advertising restrictions.

MPAA supports allowing non-U.S. satellite systems to serve the U.S. market because this will enhance competition in the U.S. market and increase distribution outlets for program providers, including MPAA's member companies. MPAA also supports the goal of enhancing competition in the global market for satellite services, as well as for the content that fuels those services.

MPAA believes that it is appropriate and necessary to use an ECO-Sat test in considering applications by non-U.S. satellite systems to serve the U.S. market. The ECO-Sat test should examine not only the competitive conditions facing U.S. satellite delivery services abroad, but also the competitive conditions affecting U.S. content provided via all types of satellite services.

DBS/DTH services, in particular, are an integrated package that include both the transport services and the content being transported; both parts of the package need to be considered. The fact that there is a shortage of domestic DBS orbital slots on the U.S. market should be factored into the Commission's "public interest" determination, but is not a reason to forego application of an "equivalent competitive opportunities" (ECO-Sat) test. An open regulatory regime with regard to content will also help ensure economic efficiency by maximizing the inherently regional nature of the DBS/DTH industry.

Failure to consider content in authorizing foreign satellites to serve the U.S. market could have the unintended and perverse consequence of subsidizing protectionist content policies abroad. Foreign satellite operators whose home country's content policies restrict access to U.S. program content -- and therefore reduce the profitability of satellite services delivering video content in their home market -- could use access to the lucrative U.S. market to overcome the commercially questionable content policies of their home jurisdiction -- all at the expense of U.S. content exports.

Combating discriminatory trade measures that burden and restrict the export of U.S. goods and services is an appropriate objective for the Commission and the Executive Agencies, even when those trade protectionist measures are couched in terms of cultural and social policy goals.

The United States has a public interest in maintaining the global competitiveness of the U.S. content industries by seeking to reduce the onerous, discriminatory restrictions on U.S. content imposed by foreign governments and by seeking to improve the protection of U.S. intellectual property in foreign markets; this interest is separate from, but as important as, the goal of ensuring the competitiveness of U.S. satellite systems. MPAA recommends that these trade goals should be part of the Commission's "other public interest" determination, based on appropriate advice by Executive Branch agencies.

Neither the negotiations on basic telecommunications in the World Trade Organization nor the Regulatory Scheme for DBS services in the ITU provides an adequate substitute for the regulatory undertakings proposed by the Commission in this NPRM.

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**REPLY COMMENTS OF
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

The Motion Picture Association of America, Inc. ("MPAA"),¹ hereby submits this Reply to Comments filed by other parties on the Commission's Notice of Proposed Rulemaking, in the above-captioned proceeding.

¹ MPAA is a trade association representing eight of the largest U.S. producers, distributors, and exporters of theatrical motion pictures, television programming, and home video entertainment. They include: Buena Vista Pictures Distribution, Inc. (Disney); Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Turner Broadcasting System Inc.; Twentieth Century Fox Film Corporation; Universal City Studios Inc.; and Warner Bros.; A Division of Time Warner Entertainment Company.

I. PERMITTING NON-U.S. SATELLITES TO SERVE THE US MARKET BENEFITS U.S. PROGRAM PROVIDERS

MPAA supports allowing non-U.S. satellites to serve the domestic U.S. market. The filmed entertainment industry relies on strong and competitive distribution networks for getting its filmed entertainment to consumers. From MPAA's perspective, the more satellite providers that offer a variety of delivery systems for video distribution services in the U.S., the better the interests of the filmed entertainment producers are served.

II. THE COMMISSION SHOULD EXAMINE BARRIERS TO ENTRY OF U.S. CONTENT AS PART OF THE ECO-SAT TEST FOR FOREIGN SATELLITE SYSTEMS.

MPAA's desire to increase distribution outlets in the U.S. market is tempered with the knowledge that many foreign countries restrict market access opportunities both for U.S. satellite providers and for U.S. content providers. An FCC policy that limited its vision to the U.S. market alone and ignored an opportunity to enhance competition in the global market for satellite services, and for the content that fuels those services, would be short-sighted indeed. MPAA, therefore, believes it is essential to examine barriers to entry of U.S. content as part of the test of "effective competitive opportunities for U.S. satellites" ("ECO-Sat") for non-U.S. satellites wishing to provide video-delivery services in the United States, except for occasional use video transmission services.²

There is a close link between satellite-provided delivery services for video programming and the content that is being provided. This connection is valid for satellites that provide Direct Broadcast Satellite/Direct to Home services and those that utilize retransmission techniques, such as cable television networks (CATV) that pick up satellite signals from an earth-station head-end and relay the content to individual subscribers, or satellite master antennae television (SMATV) systems that relay satellite signals to households in an apartment block, or microwave transmission systems (MMDS) that relay the satellite signals in microwave frequencies to household antennae. In all cases,

² The comments of Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., and Turner Broadcasting Systems, Inc. point out that to fulfill their news and program distribution missions, the Networks require the ability to transmit programming materials around the globe and rely exclusively on satellite technology for their overseas video transmission requirements. The Networks urge the Commission not to apply the ECO-Sat test to Fixed Satellite services (FSS) especially with regard to international occasional use video transmission services, and if an ECO-Sat test is applied, to take the unique concerns of the broadcasters and cable-casters especially with respect to news-gathering and other special events into account. Nothing in MPAA's Reply Comments should be read to undermine this aim.

the demand for the satellite transmission service depends, directly or indirectly, on the customers' willingness to subscribe to the programming services -- which depends in no small part on the availability of diverse, commercially attractive programming content.

III. DBS/DTH SERVICES INTEGRATE CONTENT AND TRANSMISSION, PROVIDE REGIONAL ECONOMIES OF SCALE, AND SHOULD BE SUBJECT TO ECO-SAT TEST, NOTWITHSTANDING SHORTAGE OF U.S. ORBITAL SLOTS.

MPAA concurs with MCI that "DBS/DTH services involve an integrated offering of programming and broadcast transmission services. As a consequence, application of the ECO-Sat test must, as a matter of law and policy, include consideration of the extent to which content-related restrictions impede the ability of U.S. DBS/DTH operators to send their programming to an international audience -- in particular, consumers in the home market of the foreign satellite operator."³ Authorization to provide DBS/DTH services is only meaningful to the extent that the DBS/DTH operators do not face onerous restrictions on the content that they may provide. A DBS/DTH operator that faces regulatory barriers on content such that the operator is not permitted to provide programs that have commercial appeal does not enjoy effective market access.

An FCC policy that promotes openness in foreign regulatory regimes with regard to content helps ensure economic efficiency. DBS/DTH is inherently a regional industry that spans national boundaries. MCI notes the economies of scale and scope which derive from using the same programming to serve multiple national markets.⁴ MPAA concurs, while noting that appropriate copyright authorization must, of course, be obtained to correspond to the territories served.

DBS/DTH services will not be able to operate efficiently (or at all) if they must take into account onerous content or advertising restrictions, such as content restrictions applied on a "per channel" basis, or restrictions on foreign-originated or regional advertising. A regional DBS/DTH service would also be hard-pressed to accommodate a patchwork of competing national content quotas.

³ MCI at 16.

⁴ MCI at 18.

As noted by Western Tele-Communications, Inc. (WTCI),⁵ the number of DBS orbital locations allocated by the International Telecommunication Union (ITU) is limited, and the slots allocated to the United States have now all been assigned. In this regard, MPAA agrees with the Commission⁶ that a shortage of spectrum should be included as an additional public interest factor that must be carefully balanced together with other factors, including the results of the ECO-Sat test.

However, we disagree with WTCI's assertion that given the fact that there is a domestic scarcity of DBS orbital slots, the ECO-Sat test is inappropriate. Nor do we believe, as WTCI has argued, that the "public interest" should always be presumed to be best served by foregoing application of an ECO-Sat analysis, especially if an option exists of addressing the domestic shortage through cooperative use of foreign orbital slots with countries that meet the ECO-Sat test compared to countries that employ burdensome restrictions on DBS satellites and content.

IV. FAILURE TO INCLUDE CONTENT IN THE ECO-SAT TEST FOR NON-U.S. SATELLITES COULD SUBSIDIZE FOREIGN POLICIES THAT DISCRIMINATE AGAINST U.S. CONTENT

Foreign protectionist policies affecting content can doom the satellite distribution services for video programming in those countries to marketplace failure, because customers simply won't buy these services if the program package is uninteresting or heavily burdened with inappropriate, heavy-handed content regulations. Satellite facilities operators could not survive on the distribution of programming services that are burdened by heavy content restrictions. An FCC policy that failed to take content into consideration in licensing non-U.S. satellite services to U.S. customers could have the perverse effect of subsidizing satellite systems operators facing non-economic content restrictions in their home countries -- and thereby subsidizing policies deliberately aimed at denying access to U.S. content providers. Without an ECO-Sat test that includes content as an integral element, non-U.S. satellite facilities operators, facing content regulations that render provision of DBS/DTH and other forms of satellite-delivered services in their home country economically nonviable, could use access to the lucrative and open U.S. market to subsidize their operating losses in their home market.

⁵ Comments of WTCI at 3-7.

⁶ DISCO II NPRM at para 12.

V. COMBATING "CULTURAL MEASURES" THAT HAVE DISCRIMINATORY TRADE EFFECTS ON U.S. CONTENT EXPORTS IS APPROPRIATE

MPAA takes strong exception to WTCI's comments, which assert that it would be "inappropriate and ill-advised for the Commission to interfere with the domestic social and cultural policies of sovereign foreign governments by limiting foreign trade based on issues of program content"⁷ MPAA recognizes and supports the desire of governments to pursue "domestic social and cultural" goals. However, the policy tools used to achieve those goals should not have a deleterious effect on a country's trading partners.

The World Trade Organization's General Agreement on Trade in Services (GATS) sets the global standards for trade in services. GATS rules provide no exceptions for measures taken in the name of culture,⁸ thereby clearly establishing the legitimacy of trade concerns with respect to services that embody cultural elements. When domestic social and cultural goals are pursued through discriminatory trade measures that burden and restrict the export of U.S. good and services, then those issues are and must be the appropriate subject of Commission and Executive Agency attention.

All countries are free to adopt non-discriminatory policies in pursuit of domestic social, cultural goals -- or any other goals. Moreover, countries may even adopt trade-distortive measures when such measures are necessary to protect human, animal or plant life or health. The U.S. measures cited by WTCI⁹ are non-discriminatory. Programming and advertising originating in any country in the world can meet those standards.

MPA member companies distribute their programming in markets all around the world, conforming to non-discriminatory standards -- whether those standards are motivated by public health policies, such as bans on depiction of alcohol consumption, or local cultural values with respect to sex or violence. Such non-discriminatory measures are fundamentally different from discriminatory, trade-distortive restrictions based on national origin of the programming. The trade-distortive results cannot be excused or ignored simply because they may have a cultural or social policy motivation.

⁷ WTCI at 13.

⁸ See Article XIV of the General Agreement on Trade in Services in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, adopted at the Marrakech Ministerial Meeting, March 1994.

⁹ WTCI at 13.

VI. ASSURING A LEVEL PLAYING FIELD FOR U.S. CONTENT PROVIDED VIA SATELLITE SHOULD ALSO BE PART OF THE "PUBLIC INTEREST" DETERMINATION

In addition to the role that content plays in ensuring the global competitiveness of U.S. satellite operators, the United States has a separate and equally important public interest in maintaining the global competitiveness of U.S. content industries by seeking to reduce the onerous, discriminatory restrictions imposed by foreign governments. This trade goal should be part of the "other public interest" determination which the Commission should make with appropriate input from the Executive Branch.

The U.S. copyright-based industries, including the broadcasting, television and industries, are among the largest and fastest growing sectors of the U.S. economy. These industries accounted for almost \$240 billion in value added to the U.S. economy and grew at a rate that was more than double the growth rate of the economy as a whole (5.6% vs. 2.7% during the 1991-93 period.) The core copyright industries also earned at least \$46 billion in foreign sales in 1993. Together with other copyright-based industries, the filmed entertainment industry is second only to motor vehicles and automotive parts among U.S. industries in terms estimated foreign exports.¹⁰

Failure of foreign countries to protect intellectual property of satellite-transmitted content should also be considered, again with appropriate guidance from the Executive Branch, as part of the "other public interest" determination. Lack of adequate and effective protection of intellectual property can be as effective a deterrent to market access as quotas or other forms of quantitative market access restrictions.

¹⁰ Stephen E. Siwek, Copyright Industries in the U.S. Economy: 1977-1993, 3 (1995) (prepared for the International Intellectual Property Alliance by Economists Incorporated).

VII. NO OTHER INTERNATIONAL RULES RENDER THIS PROPOSED RULE INAPPROPRIATE

ICO Global Communications¹¹ and GE American Communication¹² argue that further action in this proceeding should be postponed until after completion of the WTO talks on basic telecommunications to avoid prejudicing the outcome of those negotiations. The European Commission also expresses its belief that the proposed FCC approach to licensing of foreign satellite system seriously impacts the multilateral WTO/GATS Negotiations on Basic Telecommunications.¹³ MPAA notes that while participants in those negotiations have raised questions about the intended scope of countries' offers with respect to satellite communications in the WTO basic telecommunications negotiations, particularly as to whether the offers cover satellite transport of broadcast signals and other forms of video programming, the majority of countries do not appear to intend their offers on satellite communications services to extend much beyond transport of voice and data.

Without addressing the merits of the arguments made by ICO Global Communications and GE American Communications and the European Commission with respect to basic voice and data transport, MPAA believes it would be totally inappropriate for the FCC to forego the opportunity of addressing satellite transport of video programming in a domestic rulemaking when it is clear that the odds of addressing this issue in a multilateral forum in the near future are uniformly believed to be low.

Finally, WTCI argues that given the well-developed international regulatory scheme for DBS under the International Telecommunications Union, application of an ECO-Sat test is inappropriate.¹⁴ However, one of the failings of the current regulatory regime is precisely that it ignores the role that content issues play in the competitive delivery of DBS services.

¹¹ ICO Global Communications at 20.

¹² GE American Communication at i.

¹³ Note Verbale of the European Union Delegation of the European Commission to the Department of State, dated August 9, 1996.

¹⁴ WTCI at 10.

CONCLUSION

In conclusion, MPAA welcomes the Commission's proposal to ensure that effective competitive opportunities are available to U.S. satellite operators abroad, which represent important delivery systems for facilitating the export of U.S. content. MPAA urges the Commission to consider the recommendations included in these Reply Comments in formulating its final rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bonnie J. K. Richardson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Bonnie J. K. Richardson
Vice President
Trade and Federal Affairs
Motion Picture Association of America

August 16, 1996